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No. 02-143

IN THE

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 744,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In articulating the appropriate standard of review for labor arbitration awards under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, this Court has held that if an arbitrator "is even arguably construing or applying the contract and acting within the scope of his authority" the arbitrator's interpretation of the contract must be upheld. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504, 509 (per curiam) (2001) (citations omitted). It is only where an arbitrator departs from interpreting the labor contract and "dispense[s] his own brand of industrial justice" that the award should be denied enforcement. *Id.* (citations omitted).

In this case, the Seventh Circuit vacated an arbitration award because the arbitrator exceeded express limits the parties had placed on his authority, used practices external to the labor contract to modify clear and unambiguous contract language and relied upon notions of fairness in rendering his award.

Thus, the question presented is whether the Seventh Circuit violated the applicable standard of review when it vacated the arbitration award on the above grounds.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent states that its parent corporation is Anheuser-Busch Companies, Inc., a publicly-held company which owns all of Respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Anheuser-Busch, Inc. ("ABI"), submits this brief in opposition to the petition for writ of certiorari filed by the Petitioner, International Brotherhood of Teamsters, Local Union No. 744 ("IBT").

STATEMENT OF THE CASE

This case arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and concerns federal court review of a labor arbitration award that the IBT sought to confirm and ABI sought to vacate. *See* App. 10a. ABI and the IBT have been parties to a series of labor contracts that covered, *inter alia*, ABI employees who delivered products to certain retail customers ("drivers"). *Id.* at 48a-49a, 54a-55a.

Beginning in 1990, Article 12, Section 1 of the parties' contract gave ABI the clear and unambiguous right to pay lower commission rates to drivers assisted by a "helper" ("two-person routes") than drivers who worked alone ("one-person routes"). *Id.* at 49a, 51a-52a. Specifically, Article 12, Section 1 sets forth the "commissions and wage rates" that "shall" be paid on such routes:

> (a) *One-Person Routes.* A Package Driver Salesman who has no Assistant Driver Salesman assigned to the route serviced by him shall be paid the following commissions for each case of merchandise sold or delivered during the term of this Agreement to stops on the route serviced by him:
>
> | | 2/1/98 | 2/1/99 | 2/1/00 | 2/1/01 | 2/1/02 |
> |---|---|---|---|---|---|
> | Route-sell stops | 38¢ | 39¢ | 40¢ | 41¢ | 42¢ |
> | Pre-sell stops | 30¢ | 31¢ | 32¢ | 33¢ | 34¢ |
>
> Any Package Driver Salesman covered by this paragraph (a) who is directed to deliver draft beer to a stop will be paid a commission of $1.25 per half barrel delivered.
>
> (b) *Two-Person Routes.* A Package Driver Salesman who has an Assistant Driver Salesman (or any other employee assigned as a Helper) assigned to the route serviced by him shall be paid the following commissions during the term of this Agreement for each case of merchandise sold or delivered to stops on the route serviced by him:
>
> | | 2/1/98 | 2/1/99 | 2/1/00 | 2/1/01 | 2/1/02 |
> |---|---|---|---|---|---|
> | Route-sell stops | 30¢ | 31¢ | 32¢ | 33¢ | 34¢ |
> | Pre-sell stops | 23¢ | 24¢ | 24½¢ | 25½¢ | 26½¢ |
>
> Any such Package Driver Salesman who is assigned to a route on which the list of accounts had a history of purchasing not more than 125,000 cases during the prior 12-month period shall be paid $100.00 per week of 5 days in addition to the above commission. Any Package

> Driver Salesman covered by this paragraph (b) who is directed to deliver draft beer to a stop will be paid a commission of 90¢ per half barrel delivered.

Id. at 51a-52a.

Despite the language of Article 12, Section 1, ABI continued to pay the higher one-person commission rate whether or not a driver was assisted by a helper throughout the terms of the parties' 1990 and 1994 contracts. *Id.* at 49a, 55a. Then, two months into the term of the 1998 contract (effective from 1998 to 2004), ABI announced that for a variety of business reasons it would begin compensating drivers in accordance with the language of Article 12, Section 1.[1] *Id.* at 57a-58a, 60a-61a.

The IBT grieved ABI's exercise of its contractual rights and the matter proceeded to arbitration. *Id.* at 49a-50a. The IBT did not dispute that Article 12, Section 1 clearly and unambiguously gave ABI the right to pay lower commission rates on two-person routes. *Id.* Instead, the IBT claimed ABI's prior practice of always paying the one-person rate trumped the express provisions of Article 12, Section 1. *Id.* The parties presented the following stipulated issue to the arbitrator: "Did the company violate the labor agreement by

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[1] In February 1998, ABI began to study ways to address concerns over customer service and rising sales volumes. *Id.* at 57a-58a. Many accounts were demanding service within specific time "windows" while also insisting deliveries be handled as quickly as possible to minimize disruption. *Id.* Since accounts often received hundreds of cases per delivery, ABI decided to increase the number of helpers. *Id.* at 60a. The addition of helpers meant increased costs, so ABI reduced the number of total routes from 10 to 9. *Id.* While the commission rate paid on two-person routes would be lower, the financial impact on drivers was minimal because the concurrent increase in average route volume among the remaining routes raised the number of cases for which commissions would be earned. *Id.* at 60a-61a.

changing its practice to conform to the contract provision relating to two-person route commission rates?" *Id.* at 48a.

Beyond Article 12, Section 1's obvious significance to the parties' dispute, of relevance to the arbitrator's award were two other contractual provisions. First, the 1998 contract's integration or "zipper" clause provided:

> Entire Agreement. This Agreement constitutes the full and complete agreement between the parties and supersedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the express provisions of this Agreement. This Agreement is the entire agreement between the parties and is the result of extensive negotiations in which both parties had the right and opportunity to submit proposals and to negotiate their proposals with the other party. Consequently, except as expressly otherwise provided, neither party is obligated to bargain during the term of this Agreement except to bargain for a new agreement prior to the expiration of this Agreement.

Id. at 53a-54a (underlining in original).

In addition, Article 4 of the 1998 contract expressly limited the authority of an arbitrator in resolving a grievance:

> The jurisdiction of the arbitrator shall be only in regard to the particular dispute before him and he shall have no power or authority to add to, subtract from, modify or change in any way the terms of this Agreement . . .

Id. at 50a.

The arbitrator sustained the IBT's grievance and ordered ABI to continue to compensate all drivers at the higher one-person rate regardless of whether helpers assisted in the deliveries. *Id.* at 73a-76a. The arbitrator, however, rejected the IBT's contention that the practice of always paying the one-person rate under the 1990 and 1994 contracts modified

the 1998 contract, finding that any pre-1998 evidence of past practices was excluded by the parol evidence rule and the 1998 contract's zipper clause, which the arbitrator described as a "strong" and "well-constructed" provision that prohibited reliance on past practices not specifically incorporated into the 1998 contract. *Id.* at 67a-72a.

Despite this ruling, the arbitrator concluded that ABI's payment of the one-person rate for two months after the commencement of the 1998 contract resulted in the "readopt[ion]" of a "long-standing practice" that nullified ABI's right to pay the lower two-person rate set forth in Article 12, Section 1. *Id.* at 73a. According to the arbitrator, neither the parol evidence rule nor the zipper clause prevented him from substituting this "readopted" practice for the clear and unambiguous language of Article 12, Section 1. *Id.* at 72a-74a. The arbitrator further found that ABI's decision to wait until two months into the term of the 1998 contract to change its practice "deprived the Union of its right to bargain . . . for almost five years," which the arbitrator termed a "fundamentally unfair maneuver inconsistent with well-settled principles of collective bargaining." *Id.* at 75a. The arbitrator also found that he could not "excuse the Company's failure to offer the Union an opportunity . . . to bargain" about the issue. *Id.*

Both ABI and the IBT filed actions in federal court and on cross-motions for summary judgment the district court enforced the award. *Id.* at 10a. The district court observed that the post-1998 "law of the shop" found by the arbitrator (i.e., paying all drivers the one-person rate for two months) directly conflicted with the unambiguous terms of Article 12, Section 1. *Id.* at 42a. The district court further found that the "arbitrator looked to ongoing practices to nullify the two-person provision and excise it entirely" and additionally noted that the "arbitrator admittedly went outside of the written contract" to nullify the written terms of the 1998 contract. *Id.*

The district court also noted that in rendering his award the arbitrator made "noises of fairness, invoked extra-contractual principles of labor law and seemed persuaded by the 'same long-standing' past practice that he found invalid under the terms of the CBA." *Id.* at 43a.

The district court further acknowledged that under existing Seventh Circuit precedent, "[a]n arbitrator may not use the law of the shop to modify clear and unambiguous provisions of a CBA." *Id.* at 41a-42a, *citing Chicago Web Printing Pressmen's Union, No. 7 v. Chicago Newspapers Publishers' Assoc.*, 772 F.2d 384, 387-388 (7th Cir. 1985) and *Tootsie Roll Industries, Inc. v. Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union*, 832 F.2d 81, 84 (7th Cir. 1987). Despite these findings, the district court enforced the arbitrator's award, citing the limited judicial review of arbitration awards. *Id.* at 43a. The district court reasoned the arbitrator based his award on a "separate oral" "meta" agreement allegedly created by ABI and the IBT that trumped the unambiguous language of Article 12, Section 1. *Id.* at 43a-44a. On this basis, the district court "barely" enforced the arbitration award. *Id.* at 43a.

ABI appealed to the Seventh Circuit, which vacated the arbitrator's award in a decision that generated three separate opinions. *Id.* at 3a-36a. The Seventh Circuit began its analysis by stressing that it was not reviewing whether the arbitrator misinterpreted the 1998 contract; rather, it was focused on whether the "arbitrator's inquiry disregarded the very language of the agreement itself." *Id.* at 11a-12a (citations omitted). The Seventh Circuit noted that while an arbitrator may rely on the "law of the shop" to interpret an ambiguous contract provision, he could not use such external practices to alter clear and unambiguous contract terms. *Id.* at 14a-15a, *citing Tootsie Roll*, 832 F.2d at 84; *International Ass'n of Machinists, Lodge No. 1000 v. General Elec. Co.*, 865 F.2d 902, 906 (7th Cir. 1989); and *Judsen Rubber*

Works, Inc. v. Manufacturing, Production & Service Workers Union Local Union No. 24, 889 F. Supp. 1057, 1066 (N.D. Ill. 1995).

With the foregoing principles in mind, the Seventh Circuit concluded that since Article 12, Section 1 clearly and unambiguously gave ABI the right to pay lower commission rates on two-person routes there was no need to "interpret" the 1998 contract to resolve the IBT's grievance. App. 15a-17a. Moreover, given the express limits on his authority, the Seventh Circuit found improper the arbitrator's resolution of the grievance not by reference to the unambiguous provisions of Article 12, Section 1 but by reference to past practices the arbitrator had concluded he was prohibited from considering by the contract's zipper clause. *Id.* at 15a. *See also id.* at 25a and 27a-29a (Rovner, concurring). By resolving the grievance in this fashion, the Seventh Circuit held the arbitrator exceeded his authority by improperly nullifying the two-person rate set forth in Article 12, Section 1:

> Any interpretation drawing its essence from the written contract necessarily would have recognized that the arbitrator was without authority to modify or change the contract in any way. By contrast...the arbitrator issued an award based not on any reading or language in the contract, but rather on his personal view of how the contract would read if [ABI's] conduct were somehow codified and inserted into the document itself.

Id. at 17a.

The Seventh Circuit also rejected the dissent's assertion that the arbitrator was engaged in interpretation of the 1998 contract when he concluded that ABI's "post-signing" conduct had modified Article 12, Section 1, notwithstanding the limits on his authority set forth in Article 4. *Id.* at 18a-19a. According to the Seventh Circuit, the arbitrator's analysis demonstrated he did not rely upon ABI's post-signing conduct in sustaining the grievance. *Id.* at 19a.

Moreover, to accept the dissent's argument impermissibly rendered the "no modification" provisions of Article 4 superfluous, again thereby exceeding the arbitrator's authority. *Id.*

The Seventh Circuit further concluded that in rendering his award, the arbitrator improperly relied on his own personal notions of fairness. *Id.* at 21a-25a. Noting that the arbitrator termed the timing of ABI's action to be "fundamentally unfair," the Seventh Circuit stated that any award based on the arbitrator's notion of what was "fair" was prohibited by this Court's holding in *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) that arbitrators may not dispense their "own brand of industrial justice." *Id.* at 21a-23a. In conclusion, the Seventh Circuit held that the arbitrator's decision failed to draw its essence from the 1998 contract because the award "exceeded the confines of interpreting and applying the contract." *Id.* at 25a.

In concurring with the judgment, Judge Rovner noted that contrary to the dissent's assertion, the Seventh Circuit was not called upon to consider whether the arbitrator would have been justified in concluding that ABI's two-month practice of only paying the one-person rate modified the terms of the 1998 contact. *Id.* at 27a-28a. According to Judge Rovner, the arbitrator never inquired whether that two-month practice, in and of itself, was sufficient to displace the clear and unambiguous language of Article 12, Section 1. *Id.* Instead, the arbitrator focused on whether the parties' post-1998 conduct "signaled an intent to carry forward" ABI's pre-1998 practice into the 1998 contract—even though such practices were specifically excluded from consideration by the arbitrator's interpretation of the zipper clause. *Id.* at 28a-29a.

Thus, while the arbitrator's award referenced ABI's post-signing conduct, Judge Rovner found the arbitrator's underlying reasoning clearly showed he in fact relied upon

ABI's pre-signing conduct and was merely using the two-month, post-1998 practice to bootstrap the past practices into the 1998 contract. *Id.* at 28a-29a.

In dissent, Judge Easterbrook argued the award should be enforced because he believed it reflected the arbitrator's attempt to interpret both the zipper clause and Article 4 of the 1998 contract. *Id.* at 29a-36a. According to Judge Easterbrook, the fact the arbitrator may have relied on "pre-signing" conduct (despite the arbitrator's interpretation of the zipper clause) and may have "acquiesced in . . . [the] temptation to enforce pre-contractual conduct in the name of fair play" were not sufficient bases upon which to vacate the award. *Id.* at 33a-34a.

IBT's post-judgment petition for rehearing *en banc* was denied (*id.* at 2a) and this Petition followed. In support of its Petition, the IBT argues: (a) that the Seventh Circuit's decision allegedly conflicts with Supreme Court, Seventh Circuit and other Circuit Court of Appeals precedent; and (b) that the Seventh Circuit opinion is "wrong" in that it purportedly substitutes its interpretation of the zipper clause for the arbitrator's interpretation. Neither argument can withstand scrutiny, nor do any of the points raised by the IBT warrant this Court's extraordinary intervention.

ARGUMENT

The Seventh Circuit's opinion is vigorous in the advocacy of its governing precedent and undertakes a rigorous examination of the various arguments advanced by the parties, the arbitrator and the district court. Contrary to the IBT's claim, however, the Seventh Circuit's decision remains true to federal law because it respects the parties' clear and unambiguous contract language, particularly Article 12, Section 1 which gives ABI the unqualified right to pay lower commission rates on two-person routes.

In light of that clear and unambiguous language, the Seventh Circuit found that the arbitrator exceeded the scope of his authority—as expressly restricted by the 1998 contract's zipper and "no modification" clauses and as stipulated to by the parties at the arbitration—by nullifying the two-person rate of Article 12, Section 1 in favor of ABI's two-month practice of paying all drivers the one-person rate. In doing so, the Seventh Circuit held that the arbitrator violated bedrock precepts of labor contract interpretation.

In seeking this Court's intervention, the IBT disregards the Seventh Circuit's reasoning in favor of a distorted and misstated view of what the Seventh Circuit concluded. In that regard, the IBT's "Question Presented" is a classic strawman. An accurate reading of the Seventh Circuit's analysis reveals a decision aligned correctly with this Court's precedent governing appropriate judicial review of arbitration awards. Thus, contrary to the IBT's claim, the Seventh Circuit's vacatur of the award does not stem from its disagreement with the arbitrator's interpretation of the zipper clause; rather, the Seventh Circuit properly found the arbitrator's personal brand of industrial justice to be incompatible with the law and the issue the parties' stipulated submission asked him to resolve. Accordingly, there is no reason for this Court to further review the Seventh Circuit's opinion and the Petition should be denied.

Indeed, the labor policy truly at issue—and the one that will be preserved by a denial of the Petition—recognizes that the parties, not the arbitrator, determine scope of the arbitrator's authority. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643, 648-49 (1986). In this case, whatever the arbitrator's view of the proper scope of the zipper clause, he was also limited by two other express limits on his authority. First, the 1998 contract specifically prohibited the arbitrator

from taking any action that would "add to, subtract from, modify or change in any way the terms" of the labor contract. App. 50a. Second, the parties' submission did not ask the arbitrator to determine whether ABI's "post-signing" conduct was sufficient to modify the admittedly clear and unambiguous terms of Article 12, Section 1. *Id.* at 6a. *See also id.* at 19a and 27a-28a (Rovner, concurring). Instead, the arbitrator was asked only whether ABI "violated [the parties'] labor agreement" by "changing its practice to conform to the contract provisions relating to two-person route commission rates . . ." *Id.* at 48a. The arbitrator's disregard of these limits on his authority formed the solid basis for the Seventh Circuit's decision to vacate his award.

I. THERE IS NO CONFLICT OF PRECEDENT

Petitioner cites this Court to a long line of cases for the proposition that "so long as the labor arbitrator interpreted the contract in making his or her award, the award must be affirmed even if the arbitrator clearly misinterpreted the contract."[2] Petition at 8. This seemingly uncontroversial statement of law, however, is only half the equation. As this Court has recently held, an arbitrator's contract interpretation is entitled to deference, even if incorrect, *as long as the arbitrator is also acting "within the scope of his authority." Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504, 509 (per curiam) (2001), *citing Eastern Associated Coal*

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[2] Notably, none of the thirteen cases cited in the Petition stand for the IBT's bold proposition that an arbitrator is always free to clearly misinterpret a labor contract. Instead, the cases all repeat the generally-accepted rules regarding judicial review of arbitration awards. A fair reading of those cases underscores the longstanding principles upon which the Seventh Circuit based its decision: *so long as the arbitrator acts within the scope of his authority and interprets ambiguous contract language* a court must enforce the award even if it disagrees with the arbitrator's interpretation. Here, since there was no ambiguity in Article 12, Section 1, there was nothing for the arbitrator to interpret. *Id.* at 16a.

Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (emphasis added). It is this rule of law, and the arbitrator's violation of it, that compelled the Seventh Circuit to vacate the arbitrator's award, notwithstanding Petitioner's selective culling of passages from the majority's opinion. This Court's precedent clearly differentiates between valid judicial deference and the type of judicial abdication espoused by the IBT.[3] *Id.*

The Seventh Circuit's decision represents no departure from the precedent cited in the Petition. As this Court noted most recently in *Garvey*, an arbitrator must act within the scope of his authority in order to receive the deference this Court's jurisprudence allows. *Id.*, 532 U.S. at 509. Having failed in the preeminent principle to respect the limits on his authority, the fact that the arbitrator made "noises of contract interpretation"[4] in rendering his award does not entitle him to deference. Said simply, vacating the award where the arbitrator exceeded his authority does not create any conflict of precedent. To the contrary, it reflects the simple application of controlling precedent.

II. EVEN IF THE SEVENTH CIRCUIT'S OPINION IS "WRONG" THE PETITIONER IDENTIFIES NO BASIS SUFFICIENT TO WARRANT THIS COURT'S REVIEW

Notably, Petitioner spends more time registering its disagreement with the Seventh Circuit's analysis (i.e., demonstrating how it is "wrong") than it does establishing a true conflict of precedent. However, the fact the IBT believes the Seventh Circuit "got it wrong" is not a basis to warrant

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[3] Indeed, the district court's need to fashion a "meta" agreement in order to endorse the arbitrator's decision (App. 43a-44a) attests to the ills of the judicial abdication advanced here by the IBT.

[4] *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985).

extraordinary review by this Court. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (dismissing writ of certiorari as improvidently granted "even though th[e] determination below may have been wrong"); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Moreover, a review of the Seventh Circuit's analysis shows no error of any kind.

Although the IBT suggests the Seventh Circuit vacated the arbitrator's award because it disagreed with the arbitrator's interpretation of the scope of the zipper clause, the true crux of the Seventh Circuit's decision turned on the following analysis which is clearly consistent with existing precedent—Since it is undisputed that: (a) Article 12, Section 1 clearly and unambiguously addressed Respondent's ability to pay two-tier commissions; (b) Article 4 clearly and unambiguously barred the arbitrator from altering any provision of the 1998 Agreement; and (c) the zipper clause barred consideration of any pre-1998 practices, the arbitrator's use of ABI's pre- or post-1998 conduct to nullify the two-person rate in Article 12, Section 1 breached the authority ascribed to him by the parties. App. 15a-19a.

Contrary to Petitioner's suggestion, the Seventh Circuit's conclusion in this regard does not turn on its rejection of the arbitrator's interpretation of the zipper clause, nor does it run counter to the precedent cited by Judge Easterbrook in dissent concerning parties' post-execution modification of labor contracts. *See* Petition at 10-11, *citing Transportation-Government Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966).[5] Instead, it is based upon well-established

[5] As the Seventh Circuit noted in response to the dissent's argument, none of the cases cited by Judge Easterbrook considered the types of limits on the arbitrator's authority present in this case. App. at 18a-19a. In addition, the Seventh Circuit and Judge Rovner's concurrence found

Seventh Circuit precedent—in turn anchored in this Court's well-established precedent—that authoritatively recognizes where labor contract terms such as Article 12, Section 1 are clear and unambiguous (a point conceded by both the Petitioner and the arbitrator), an arbitrator may *not* rely upon the "law of the shop" or other extracontractual matters to modify those provisions. *See* App. 14a-15a, *citing Tootsie Roll*, 832 F.2d at 84; *IAM v. General Elec*, 865 F.2d at 906; *Ethyl Corp.*, 768 F.2d at 186; and *Judsen Rubber Works*, 889 F. Supp. at 1066. *See also Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889, 894 (7th Cir. 1991) ("national labor policy forbids introduction ***of prior or contemporaneous*** secret agreements to contradict fundamental terms of a ratified collective bargaining agreement") (emphasis added); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) ("[a]lthough extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous, perhaps because the parties were using words in a special sense . . . ***there must be either contractual language on which to hang the label ambiguous or some yawning void . . . that cries out for an implied term.*** Extrinsic evidence should not be used to add terms to a contract that is plausibly complete without them.") (citations omitted) (emphasis added); *Brotherhood of Maintenance Way Employees v. Atchison, Topeka & Santa Fe Railway Co.*, 138 F.3d 635, 644-45 (7th Cir. 1997) (Wood, J., dissenting) ("The context of [Supreme Court decisions suggesting that "practice, usage and custom" may be used to interpret a labor contract] ***does not suggest that extrinsic evidence may be used to contradict explicit terms of a collective bargaining agreement . . . Neither case comes close to saying that extrinsic evidence may be used to contradict the plain language of an***

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that the arbitrator in fact relied upon ABI's pre-1998 conduct in sustaining the grievance, not the post-1998 conduct referenced by the dissent. *Id.* at 27a-28a.

agreement when that subject has in fact been unambiguously addressed by the parties" (citations omitted) (emphasis added); *Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co.*, 226 F.3d 903, 914 (7th Cir. 2000) *amended by* 241 F.3d 842 (7th Cir. 2001), *cert. denied* 532 U.S. 990 (2001) ("Just as employers may not rely on oral or written side agreements when those agreements contravene the terms of the governing agreement...[an employer] ***may not rely on a practice—even one accepted by the Union—that contravenes the express and unambiguous terms of the CBA."*** (citations omitted) (emphasis added).

Indeed, the Seventh Circuit in this case specifically addressed the claim that its holding was based upon a rejection of the arbitrator's interpretation of the zipper clause:

> Thus, we wish to make it clear that we are not questioning whether the arbitrator misinterpreted the agreement. Rather, our concern is limited to whether the arbitrator went beyond, or outside the bounds of interpreting the contract before him while fashioning his award. The question is not whether the arbitrator misinterpreted the agreement, but only whether the arbitrator's inquiry disregarded the very language of the agreement itself.
>
> * * *
>
> We emphasize that *we neither allege that the arbitrator committed clear error nor reached an untenable conclusion based on poorly supported factual findings.* To the contrary, we are convinced that in his opinion the *arbitrator deliberately disregarded the clear language of the contract--and thus his award failed to construe or apply the contract.*
>
> * * *
>
> The arbitrator exceeded his authority...not because he made an interpretive error—but instead because he modified the terms of a clear and unambiguous contract that needed no interpretation whatsoever.

App. 11a-12a, 12a n.2 and 17a-18a n.4 (emphasis in original and citations omitted).

Petitioner also seizes upon Judge Easterbrook's contention that nothing in the zipper clause prohibited "post-signing changes by the employer that benefit the employee." Petition at 10, *citing* App. 31a. Whether or not that is the case, that is *not* the question that the arbitrator was commissioned to resolve. The stipulated issue submitted to the arbitrator by *both* Petitioner *and* Respondent asked: "Did the company violate the labor agreement by changing its practice to conform to the contract provision relating to two-person route commission rates?" App. 48a. That stipulation was not mere boilerplate but a binding limit on the scope of the arbitrator's authority. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 318-319 (5th Ed. 1985) (parties enter into stipulations regarding the issues subject to arbitration "[t]o expand or diminish the authority of the arbitrator [or] . . . [t]o state precisely the issues to be decided by the arbitrator, and, thus to indicate the scope of the arbitrator's jurisdiction more precisely"). *Cf. Enterprise Wheel*, 363 U.S. at 597 (in *dicta*, Court notes the absence of any evidence arbitrator exceeded the scope of the parties' submission as a basis for vacating the award).

In addition, as the Seventh Circuit and Judge Rovner found, the arbitrator's analysis clearly shows that, in fact, he was relying upon ABI's pre-1998 conduct (*see* App. 6a, 27a) even though the arbitrator had interpreted the zipper clause to specifically exclude consideration of the very practices he relied upon. *Id.* Thus, the dissent's attempt to provide some basis upon which to uphold the award simply misses the mark.

In that regard, it is important to remember that the parties did *not* ask the arbitrator to generally order their labor relations or pass judgment on the ethics of ABI's institution of the lower one-person rate. Rather, the stipulated submis-

sion charged the arbitrator to read the parties' labor agreement and determine if ABI's action in "conforming" to the lower rate violated the 1998 contract. When the stipulated submission is read with the clear and unambiguous language of Article 12, Section 1 and the express limits on the arbitrator's authority set forth in the zipper clause and Article 4, one conclusion, as the Seventh Circuit found, must follow—the "conduct of the parties," either pre-signing or post-signing, was "absolutely irrelevant." App. 19a. Thus, even though the arbitrator interpreted the zipper clause to allow him to *consider* "post-signing" conduct, that consideration could not trump the express limits on his authority. Put another way, the arbitrator's reversible error was using post-signing conduct (either alone or as means to bootstrap ABI's pre-signing conduct) not codified in the 1998 contract to overturn the contract's plain terms. The Seventh Circuit properly identified this error and concluded that the award failed to draw its essence from the labor contract so as to render it unenforceable.

Petitioner incorrectly claims the majority opinion "fail[ed] to address the arbitrator's interpretation of the zipper clause" as permitting consideration of post-signing conduct. Petition at 10. Rather, the Seventh Circuit correctly recognized that the arbitrator did not in fact rely upon ABI's post-signing conduct in sustaining the grievance and further noted that the arbitrator's interpretation of the zipper clause did *not* vest him with the additional authority to gut clear and unambiguous language agreed to by the parties and substitute an "interpretation" that directly contradicted that clear and unambiguous language. App. 17a-19a and 27a-29a (Rovner, concurring).

Petitioner also takes out of context certain language from the Seventh Circuit's opinion, suggesting that it improperly took issue with the arbitrator's interpretation of the limits set forth in Article 4. *See* Petition at 11-12, *citing* App. 19a. The Seventh Circuit's words, when read *in toto*, make it clear that

the Court's observations as to the proper interpretation of Article 4 are a response to the dissent's argument that post-signing conduct may alter the terms of a labor contract. *See* App. 18a-19a. Since, as noted *supra*, the Seventh Circuit found the arbitrator did not in fact rely upon ABI's post-1998 conduct in sustaining the grievance, the Seventh Circuit's response to an argument raised by the dissent does not violate the applicable standard of review.

Finally, Petitioner suggests that the Seventh Circuit was "wrong" because it entered judgment in favor of Respondent, instead of remanding the case so the arbitrator could "clarify whether his decision was based on the post-execution conduct, the past practice, or a combination of both." Petition at 12-13. In the first place, Petitioner did not ask the Seventh Circuit for any such relief in its brief; it merely asked that the district court's opinion be "affirmed in all respects." *See* IBT Seventh Circuit Brief at 21. By raising the issue of a remand for the first time in its petition for rehearing *en banc*, the IBT failed to properly preserve the issue. *Hoover v. Ronin*, 466 U.S. 558, 574 n.25 (1984).

Moreover, since the award was improper as a matter of law and because ABI had also moved for summary judgment, the Seventh Circuit clearly acted with the scope of its authority in entering judgment in favor of ABI. Federal arbitration policy favors prompt and final resolution of arbitration cases and where the question to be resolved is one of law it is the duty of the appellate court to decide the case rather than remand the issue to the arbitrator. *See generally Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 29 (1983) (appellate court should decide legal issues "in order to facilitate prompt arbitration"); *Automobile Mechanics Local 701 v. Joe Mitchell Buick, Inc.*, 930 F.2d 576, 578 (7th Cir. 1991) *citing, Ethyl Corp.*, 768 F.2d at 188; *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *Publicis Communication v. True North Communica-*

tions, Inc., 206 F.3d 725, 730 (7th Cir. 2000). This is especially true where neither party contests the court's authority to decide an issue and any issues can be resolved from the record. *Tri-State Business Machines, Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1017 (7th Cir. 2000) *quoting, Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992); *Central States, Southeast and Southwest Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483, 491 n.5 (7th Cir. 2000).

The language cited by the IBT from this Court's decisions in *Garvey* and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41-42 (1987) does not require a different outcome. In *Garvey*, this Court found the Ninth Circuit erroneously "usurped the arbitrator's role by resolving" factual disputes and issues of credibility, instead of remanding the case for further proceedings by the arbitrator. *Id.*, 532 U.S. at 511. Likewise, this Court stated in *Misco* that remand is one appropriate method to address "procedural aberrations" in an arbitration award. *Id.*, 484 U.S. at 40, n.10. Unlike *Garvey* or *Misco*, the Seventh Circuit's decision to vacate the award did not turn on issues related to any factual determinations made by the arbitrator, nor did the Seventh Circuit find any "procedural aberrations" in the award. Rather, the Seventh Circuit vacated the award as a matter of law because the arbitrator acted outside the scope of his authority. The vacatur rested neither on questionable factual findings nor procedural irregularities. As such, a remand was not required and, given ABI's motion for summary judgment, the Seventh Circuit acted appropriately to vacate the award and bring this matter to a prompt and proper conclusion.

CONCLUSION

Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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